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No. 86-1240

In the Supreme Court of the United States

OCTOBER TERM, 1986

JULIUS TAYLOR, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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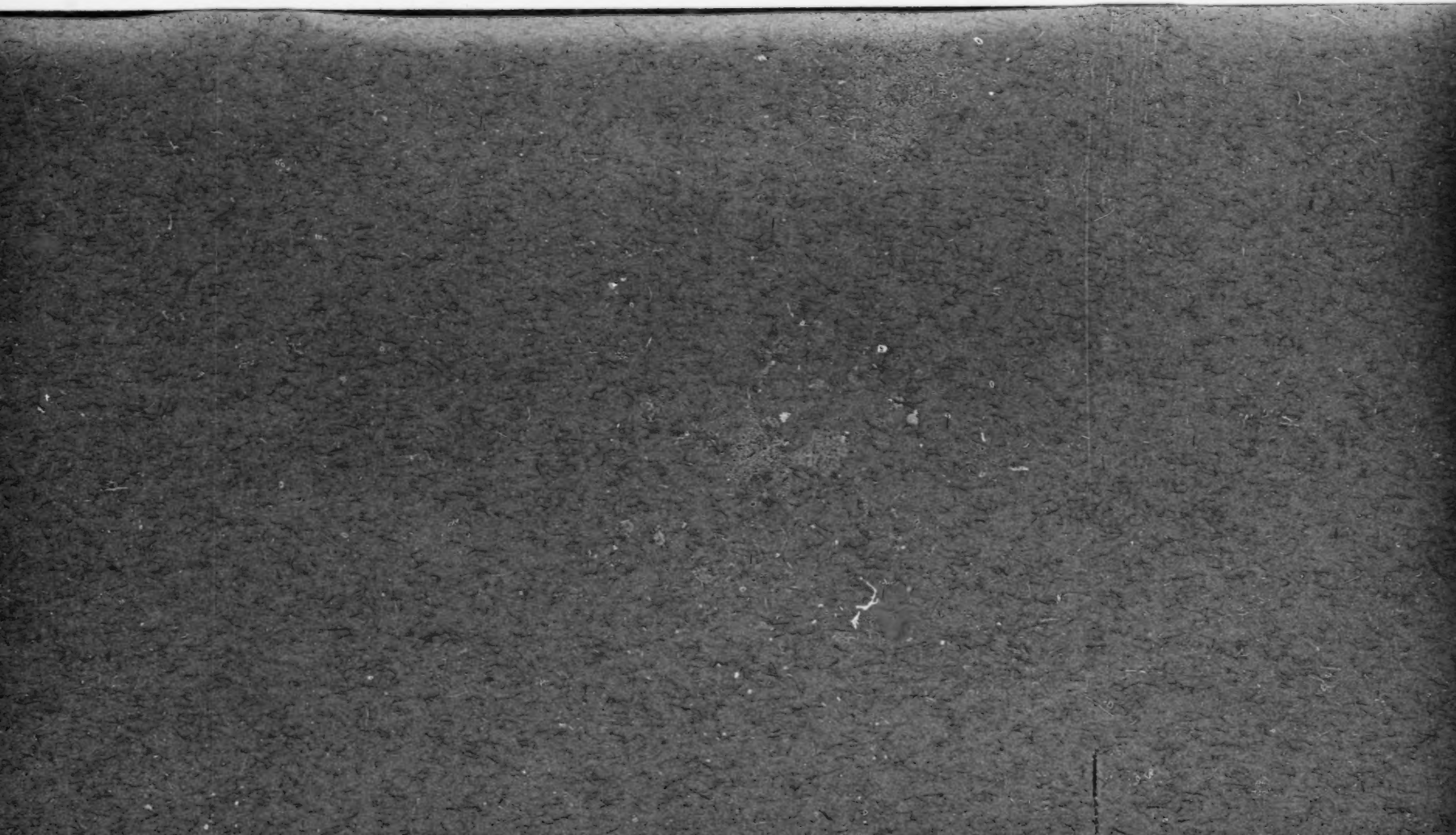

QUESTION PRESENTED

Whether the decision of the Secretary of Health and Human Services, which denied petitioner's claim for Social Security disability benefits on the ground that his impairments did not significantly limit his residual functional capacity to perform light or sedentary work, is supported by substantial evidence.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is reported at 787 F.2d 584 (Table). The opinion of the district court (Pet. App. 6-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1986, and a timely petition for rehearing was denied on April 9, 1986 (Pet. App. 3-4).

The petition for a writ of certiorari was filed on June 11, 1986, but was not served on the government until January 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed an application for Social Security disability benefits on April 20, 1976 (Pet. App. 115-116). He alleged disability since January 1975 due to arthritis in his left knee. In a later interview, he also alleged disability due to narcolepsy, an illness characterized by sudden episodes of drowsiness. Because petitioner's insured status ended on March 31, 1979 (*id.* at 45, 116, 133), he was required to establish disability prior to that date.

On January 20, 1975, while in jail, petitioner suffered an injury to his left knee when he was struck by another inmate (Pet. App. 49-50, 54). He thereafter underwent a surgical repair of the knee (*id.* at 56-57, 64-65). Although medical records reflect that the knee was relatively well healed after the surgery and that its range of motion was substantially restored (*id.* at 63-86), petitioner's physicians observed a mild or moderate arthritis in the joint before March 31, 1979 (*id.* at 69, 71). After petitioner's insured status had expired, a physician treating him in July 1982 concluded that x-rays were consistent with a diagnosis of severe arthritis (*id.* at 80). At that time, anti-inflammatory medication was prescribed and the physician recommended that prison authorities permit petitioner to use a crutch or cane (*ibid.*).

Petitioner had also been diagnosed on several occasions as suffering from narcolepsy. See Pet. App. 94-108. However, the medical records from treating

and attending medical personnel document that, when petitioner was receiving medication on schedule, he failed to complain of drowsiness (*id.* at 96-103). The medical reports also reveal that petitioner never exhibited to medical personnel any symptoms attributable to narcolepsy. The treating medical personnel instead reported that petitioner was always alert, coherent, and oriented (*ibid.*). On only one occasion prior to 1979 do the medical records indicate any complaint by petitioner of an inability to stay awake and alert (*id.* at 99). Indeed, even after petitioner's insured status had expired, when petitioner was hospitalized for observation to determine the effects of the narcolepsy, the medical personnel reported no symptoms of drowsiness, observing that petitioner was consistently awake and alert during daytime hours (*id.* at 104-105, 110-112).

In an effort to counter the absence of complaints or reported symptoms of narcolepsy in the medical records, petitioner submitted affidavits of a fellow inmate and a friend describing incidents in which petitioner fell asleep or became disoriented (Pet. App. 106-107). Petitioner also complained that, while studying for school courses, he frequently fell asleep (*id.* at 100). However, the record indicates that petitioner was not receiving proper medication during this period and that he could remain awake as long as he received medication (*ibid.*).

A medical analysis dated December 3, 1979, which was furnished by a neurology specialist (Dr. Dennis) who had reviewed the medical records, concluded that petitioner's narcolepsy disorder would likely respond well to stimulant medications. Dr. Dennis observed that petitioner's narcoleptic attacks generally could be avoided if he engaged in stimulating activities.

In October 1982, more than three and one-half years after petitioner's insured status ceased, another neurologist (Dr. Thorpy) concluded that petitioner was severely disabled at that time and was unable to perform gainful employment, although Dr. Thorpy stated that medication might improve petitioner's functional capacity. In a subsequent letter, Dr. Thorpy expressed the view that petitioner had been totally disabled since 1966. Pet. App. 107-108.

2. Petitioner's claim for benefits was denied by the Secretary in a final decision rendered on February 28, 1980, and that decision was affirmed by the United States District Court for the District of New Jersey on March 31, 1981 (Pet. App. 7). On August 4, 1981, the district court, on petitioner's motion, vacated its decision and remanded the case to the Secretary with instructions to arrange for a comprehensive neurological examination (*id.* at 7, 43, 125-126). After receiving the report of Dr. Thorpy and affidavits of friends attesting to narcoleptic incidents since 1974, the administrative law judge (ALJ) issued a decision recommending to the Appeals Council that petitioner be awarded benefits (Pet. App. 119-137). The ALJ concluded, with little discussion (*id.* at 127-128), that petitioner had been disabled since January 1975 due to narcolepsy (*id.* at 128, 134).

The Appeals Council, upon an independent review of the record, rejected the ALJ's recommendation and concluded that petitioner was not disabled at any time before the termination of his insured status on March 31, 1979 (Pet. App. 42-118). After exhaustively evaluating the medical evidence (*id.* at 63-85, 94-109), the Appeals Council found that prior to the expiration of his insured status, petitioner suffered no substantial difficulties with respect to his

knee condition and that his narcolepsy did not significantly impair his work-related abilities if it was properly controlled by medication (*id.* at 109-113). In particular, the Appeals Council concluded that petitioner's testimony and the affidavits of friends concerning incidents of drowsiness and sleep prior to March 31, 1979 "cannot be accepted as credible," in light of the contrary documentary evidence compiled during that period (*id.* at 110-111). Thus, the Appeals Council observed that, with rare exceptions, petitioner did not complain of these symptoms even when asked by medical personnel whether he had any complaints; that reports of examining physicians over those five years did not indicate any such "attack"; and that "[h]ospital records covering many periods of in-patient treatment, during which [petitioner's] behavior was observed by the nursing staff," revealed that petitioner "[h]ad been seen to be awake and alert" and engaging in various activities (*ibid.*). Nor were such episodes observed in June 1981, when petitioner was hospitalized "for the specific purpose of having [him] closely observed at half-hour intervals to determine the effects of narcolepsy" (*id.* at 111-112).

Although the Appeals Council concluded on this record that petitioner's impairments would prevent him from returning to his past work as a carpenter (Pet. App. 85-86), it found that the impairments did not significantly affect petitioner's residual functional capacity to perform sedentary or light work available in the national economy (*id.* at 117-118).

3. Petitioner then filed this action for judicial review of the Secretary's decision in the United States District Court for the District of New Jersey. In an unpublished opinion, the district court again af-

firmed the Secretary's decision, finding that it was supported by substantial evidence (Pet. App. 5, 6-41). A panel of the court of appeals unanimously affirmed in a brief order (*id.* at 1-2).

ARGUMENT

The judgment order of the court of appeals, which affirms the fact-bound and unpublished decision of the district court, is of no precedential value and presents no question of law warranting review by this Court. Furthermore, the concurrent finding by the courts below that the Appeals Council's exhaustive decision is supported by substantial evidence is clearly correct. Petitioner's insured status terminated more than eight years ago, and his claim that he was disabled prior to that time has twice been thoroughly considered by the Secretary and the district court. The petition for a writ of certiorari therefore should be denied.

1. Petitioner's principal contention (Pet. 27-51) is that the Secretary misapplied the medical-vocational guidelines, set forth at 20 C.F.R. Pt. 404, Subpt. P, App. 2. Petitioner argues that he was erroneously denied benefits by application of those guidelines, without a finding that he could perform the full range of light and sedentary work despite his nonexertional limitations. This contention is without merit.

The medical-vocational guidelines "consist of a matrix of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Heckler* v. *Campbell*, 461 U.S. 458, 461-462 (1983)

(footnotes omitted). This Court has approved the Secretary's use of the guidelines in determining entitlement to disability benefits. *Id.* at 470.

Because only exertional or strength limitations (such as those attributable to the physical impairment of petitioner's knee) are directly factored into the guidelines, the presence of non-exertional limitations (such as petitioner's narcolepsy) requires the decision-maker to determine whether the guidelines accurately describe the claimant's overall abilities. Thus, in determining whether the guidelines are applicable when the claimant has non-exertional limitations as well as an exertional impairment, the regulations require an evaluation of whether the claimant's "work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(e)(2).

In this case, the Appeals Council carefully considered the non-exertional conditions alleged by petitioner and made the necessary determination that the guidelines nonetheless could be used as a framework to assist in the disability determination in the circumstances of this case. Specifically, the Appeals Council found that the arthritis in petitioner's knee would limit him to light or sedentary work.[1] It then found that, prior to the termination of his insured status in 1979, neither of petitioner's non-exertional

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[1] In ascertaining petitioner's residual functional capacity, the Appeals Council found that, despite the arthritis in petitioner's left knee, the medical evidence demonstrated his ability to perform sedentary work, as well as light work that entailed handling objects weighing very little or pushing or pulling of controls, provided that he was able to sit most of the time. Pet. App. 88, 117.

conditions, *viz.*, his allegations of pain attributable to the arthritis and his narcolepsy disorder, would have "significantly affected" (Pet. App. 89, 110) his residual functional capacity to perform that light or sedentary work (*id.* at 80-85, 88-93, 93-110). See also *id.* at 116 (petitioner's "subjective complaints of knee discomfort, drowsiness, and 'sleep attacks,' are not credible and would have no substantial effect on his residual functional capacity").[2] Accordingly, the Appeals Council's application of the medical-vocational guidelines as a framework of decision in this case (see *id.* at 88-89, 93-94, 117-118) was fully consistent with applicable regulatory provisions and with the decisions of other courts of appeals upon which petitioner relies (see Pet. 28-36).[3]

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[2] The preamble accompanying the Secretary's initial promulgation of the medical-vocational guidelines stated that "unless the individual possesses physical capacities equal to the strength requirements for most of the jobs in that [range of work], he or she cannot be classified as able to do the pertinent range of work." 43 Fed. Reg. 55349, 55361 (1978). In this case, the Appeals Council's statement that petitioner's ability to perform light or sedentary work was not "significantly affected" by pain in the knee or narcolepsy (Pet. App. 89, 110) was but another way of saying that those non-exertional conditions did not prevent petitioner from performing "most of the jobs" in the light and sedentary ranges of work (43 Fed. Reg. 55361 (1978)).

[3] In urging the Court to grant review, petitioner seizes upon a typographical error in the Appeals Council's decision. Petitioner contends that the Appeals Council erred in "citing rules 202.28 and 202.29 of Table 2 [of the guidelines] since no such rules exist" (Pet. 35 (emphasis added)). Although the Appeals Council did mis-cite the applicable rules at one point in its decision (Pet. App. 115), in its findings at the end of the opinion, the Council correctly relied upon rules 203.28 and 203.29 of Table 2 (*id.* at 117-118).

Apparently recognizing the weakness of his argument that the Secretary failed to apply the proper legal standard, petitioner argues (Pet. 35-51) that application of the medical-vocational guidelines was inappropriate on the facts of this particular case because his non-exertional limitations were, in his view, "extremely serious" (*id.* at 36-37). However, the Appeals Council reasonably determined otherwise, based upon its independent and thorough evaluation of the evidence. Petitioner thus is simply asking this Court to re-evaluate the factual findings made by the Secretary and accepted by both courts below as supported by substantial evidence (Pet. App. 1-2, 37-41). That issue does not warrant review by this Court.

2. Petitioner's contention (Pet. 51-53) that the Secretary failed adequately to consider the cumulative effects of his multiple impairments is equally unfounded. The Appeals Council's comprehensive opinion demonstrates that it carefully evaluated *all* of the effects of petitioner's arthritic condition as well as his narcolepsy disorder. Thus, after finding that petitioner's knee problem would affect his ability to perform some work-related functions, the Appeals Council stated that "the combined effect of this condition as well as the narcolepsy and cataplexy [loss of muscle control] must be considered" (Pet. App. 58). The Appeals Council then considered the impact of petitioner's narcolepsy and determined that it would not have further restricted his residual functional capacity to any substantial degree (*id.* at 110).

In any event, since the February 13, 1984 date of the Appeals Council's decision (Pet. App. 118), Congress has expressly directed the Secretary to consider

the combined effect of multiple impairments. See 42 U.S.C. (Supp. III) 423(d)(2)(C) and 1382c(a)(3)(G). Congress further specified that this requirement would apply to disability determinations made after December 1, 1984. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(c), 98 Stat. 1801. Any questions concerning the consideration of the combined effect of multiple impairments prior to that date therefore is of no continuing importance.

3. Petitioner next contends (Pet. 53-55) that the Secretary improperly disregarded his subjective complaints of pain stemming from the arthritis in his knee. To the contrary, however, the Appeals Council carefully considered all evidence in the record that might shed light on the degree of pain (Pet. App. 88-93).

Petitioner did not specifically testify at the ALJ hearing in 1978 regarding pain in his knee, although he did attribute his disability to the knee problem (Pet. App. 72-73). In any event, the medical evidence exhaustively reviewed by the Appeals Council revealed that his knee had recovered satisfactorily after surgery (see *id.* at 63-80); that petitioner expressed no complaints about pain in his knee during his recovery or at any time prior to the expiration of his insured status in 1979 (*id.* at 66-67, 70-71, 74-78); and that he was never prescribed any medication (other than plain aspirin) for arthritic discomfort during this period (*id.* at 71-72, 78), except on a few occasions of brief flare-ups (*id.* at 73).

To be sure, more than three years *after* petitioner's insured status had ended, he was diagnosed as suffering from severe arthritis in the left knee joint, and anti-inflammatory medication was then pre-

scribed (*id.* at 80-81). However, based on its review of the medical evidence—and particularly in light of examinations in 1980 and 1981 that revealed no significant knee problems (*id.* at 77-79, 84-86)—the Appeals Council observed that these subsequent developments in 1982 indicated "a recent and relatively sudden change for the worse in the condition of [petitioner's] knee" (*id.* at 87). The Appeals Council therefore made an express finding that, as of March 31, 1979, petitioner did not suffer pain that significantly affected his capacity to perform work-related activities (*id.* at 89). Thus, the Appeals Council in no way "disregarded" petitioner's allegations of pain; it simply declined to credit those allegations, after considering the substantial evidence to the contrary.

4.a. Petitioner also argues (Pet. 55-59) that the Secretary failed to give sufficient weight to the opinion of Dr. Thorpy, the physician who examined petitioner in October 1982. In petitioner's view, the Appeals Council's decision is inconsistent in this respect with appellate decisions holding that the opinion of a treating physician is binding unless contradicted by substantial evidence. This argument, too, is without merit.

It is, of course, true that a treating physician who has maintained a long-term physician-patient relationship with a claimant is often the best source of medical information about the claimant's impairments. For this reason, the Secretary ordinarily gives special weight to the opinions and findings of the claimant's treating physician with respect to medical issues concerning the nature and severity of impairments—although, as petitioner concedes (Pet. 56-57), the physician's medical opinion is not

binding upon the Secretary where contradicted by other substantial evidence in the record, and the resolution of conflicts in the evidence is committed to the Secretary. See also *Schisler* v. *Heckler*, 787 F.2d 76, 81-82 (2d Cir. 1986); *Stieberger* v. *Bowen*, 801 F.2d 29, 31-32 (2d Cir. 1986). This case, however, does not present the issue of the weight to be given the claimant's treating physician, because Dr. Thorpy was not petitioner's "treating physician" and he had no long-term relationship or familiarity with petitioner. Rather, Dr. Thorpy merely conducted an examination of petitioner following the remand from the district court, just as any consultative physician retained by the Secretary or a state agency might do. Compare *Richardson* v. *Perales*, 402 U.S. 389, 402-403 (1971).[4] Moreover, as explained below (see page 13-14, *infra*), Dr. Thorpy's opinion was contradicted by substantial evidence in the record that more directly related to the period during which petitioner was in insured status.

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[4] Moreover, the courts of appeals are in agreement that a treating physician's opinion on the ultimate legal question of disability is not binding upon the Secretary. See, *e.g.*, *Garner* v. *Heckler*, 745 F.2d 383, 391 (6th Cir. 1984); *King* v. *Heckler*, 742 F.2d 968, 973 (6th Cir. 1984); *Wilson* v. *Heckler*, 734 F.2d 513, 518 (11th Cir. 1984); *Barajas* v. *Heckler*, 738 F.2d 641, 645 (5th Cir. 1984); *Carry* v. *Heckler*, 750 F.2d 479 (5th Cir. 1985); *Warncke* v. *Harris*, 619 F.2d 412, 417 (5th Cir. 1980); *Janka* v. *Secretary of HEW*, 589 F.2d 365, 369 (8th Cir. 1978). Accordingly, the Secretary was not required to defer to the conclusory opinion of one physician, Dr. Thorpy, who examined petitioner on one occasion in 1982, that petitioner had been "severely disabled" since 1966 (Pet. App. 107). The decision on that ultimate legal question was reserved exclusively to the Secretary.

b. In a related vein, petitioner objects (Pet. 55-56) to the Appeals Council's reliance (Pet. App. 112-113) on the views of Dr. Dennis, the neurology specialist who reviewed petitioner's medical records in 1979. Petitioner insists that Dr. Thorpy's views were entitled to more weight than those of Dr. Dennis. However, whether or not a non-examining physician's opinion, standing alone, may be relied upon to overcome the extra weight ordinarily given to the views of a treating physician (a status, we reiterate, that Dr. Thorpy did not enjoy), it is clear that a non-examining physician's opinion may constitute substantial evidence where it is consistent with the findings of other medical personnel who *have* personally examined the claimant. See, *e.g.*, *Rodriguez* v. *Secretary of Health & Human Services*, 647 F.2d 218, 224 (1st Cir. 1981). In this case, although Dr. Dennis did not personally examine petitioner, he reviewed the medical evidence provided by petitioner's treating and examining physicians and accepted their diagnosis of narcolepsy (Pet. App. 109). Based upon his medical expertise, however, Dr. Dennis concluded that narcolepsy generally responds well to stimulant medications and that narcoleptic attacks can be avoided if the individual engages in stimulating activities (*ibid.*). This opinion was fully consistent with the reports of treating and attending medical personnel, who documented that petitioner failed to exhibit any narcolpetic symptoms while under their observation (*id.* at 96-105, 109-113). The Appeals Council was unquestionably entitled to credit this direct evidence of petitioner's actual behavior.

In addition, in contrast to most of the direct evidence upon which Dr. Dennis and the Appeals Council relied, which was actually gathered during the

period when petitioner was still in insured status, Dr. Thorpy did not evaluate petitioner and render his opinion until more than 3½ years after petitioner's insured status had terminated. Particularly in these circumstances, petitioner is wrong in asserting that the Secretary was required to give controlling weight to Dr. Thorpy's opinion regarding petitioner's condition prior to March 31, 1979. In the end, it is the province of the Secretary to weigh the evidence and resolve any material conflicts. *Richardson* v. *Perales*, 402 U.S. at 399. Here, the Appeals Council's determination that petitioner's narcolepsy could be adequately controlled and did not significantly affect his ability to perform light or sedentary work prior to March 31, 1979, was amply supported by evidence in the record.

c. In any event, the various issues regarding the relative weight to be given the opinions of treating, examining and non-examining physicians do not warrant review at this time. In Section 9 of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1804), Congress added a new subsection (j) to Section 221 of the Social Security Act (42 U.S.C. (Supp. III) 421(j)), which directed the Secretary to issue regulations governing the circumstances in which a consultative examination will be obtained in connection with a disability determination. The Secretary published proposed regulations on that subject on April 20, 1987 (see 52 Fed. Reg. 13014). In the preamble to those regulations, the Secretary noted that the Senate Report on the 1984 Act stated that Congress did not intend the enactment of Section 9 to alter the relative weight that the Secretary places on the opinions of treating and consulting physicians. *Id.* at 13016 (citing S. Rep. 98-466, 98th Cong., 2d

Sess. 26 (1984)). Accordingly, in order to clarify existing policy, and in response to certain court of appeals decisions, the Secretary proposed revisions in 20 C.F.R. 404.1527 and 416.927 "to clearly indicate those instances when a treating source opinion will be conclusive, when it will be given preference, and when neither conclusiveness nor preference will be granted." 52 Fed. Reg. 13016 (1987) (see *id.* at 13022, 13030). These new regulations, when published in final form, should serve to resolve any lingering uncertainty regarding the Secretary's approach in this area. Especially in view of this pending regulatory action, there is no occasion for the Court to consider the "treating physician" issue.

5. Petitioner contends (Pet. 59-61) that the Secretary failed to comply with his own regulations that require the decision-maker to secure the medical judgment of a designated physician with respect to whether petitioner's impairments met or were medically equivalent to a listed impairment. Petitioner is simply mistaken.

Under 20 C.F.R. 404.1520(d), a claimant will be regarded as disabled, without the need to consider his age, education, and work experience, if his specific impairment or combination of impairments meets or is medically equivalent to any one of the listed impairments described by the Secretary in 20 C.F.R. Pt. 404, Subpt. P, App. 1. In express reliance on 20 C.F.R. 404.1526, the Appeals Council considered the opinion of a designated physician on this question (Pet. App. 59). After considering that opinion and all other medical evidence, the Appeals Council concluded that "[petitioner's] impairments, either singly or in combination, are not of the level of severity contemplated by any paragraph appearing in the

'Listing of Impairments' " (*id.* at 59-60; see also *id.* at 116-117).

6. Finally, petitioner objects (Pet. 61-63) to the Secretary's classification of him as an individual with a high school education for purposes of applying the medical-vocational guidelines. However, petitioner concedes (Pet. 62) that he passed his high school equivalency test while in prison. His complaints that he had difficulties in studying for this test and failed it twice before finally passing are irrelevant. The fact remains that he ultimately did succeed. Accordingly, the Secretary properly accounted for his high school level of education in applying the guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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